NO. 47765-3

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

RICHARD CHRISTENSEN, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable K.A. Van Doorninck

No. 15-1-00444-3

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the court properly deny the motion to suppress the illegally possessed firearm found on defendant during a detention that was properly initiated due to his similar appearance to an armed-robbery suspect and suspicious presence at the hotel where police had covertly arranged to meet the suspect's accomplice?

2. Should this Court withhold review of the unpreserved challenge to the detention's scope or otherwise affirm defendant's conviction since the discovery of his illegally concealed firearm after he lied about being unarmed gave police reason to expand the investigation and probable cause for his arrest?

3. Has defendant failed to prove his counsel was ineffective for reasonably limiting the motion for suppression to challenging the basis for defendant's initial detention instead trying to persuade a court that police cannot lawfully detain a deceptive armed-robbery suspect discovered to be illegally concealing a handgun?

B. STATEMENT OF THE CASE.

1. Procedure

The State charged defendant with unlawful possession of a firearm in the first degree. CP 1. Defendant brought a motion to suppress, which only challenged the lawfulness of his initial detention. CP 3-8; RP 107-09. The facts underlying the court's denial of his motion were adduced at a CrR 3.6 hearing. RP 109-11, 113; CP 95-101. Defendant proceeded to a bench trial where he was found guilty as charged. CP 68-69, 105; RP 120. His notice of appeal was timely filed. CP 88.

2. Facts

These undisputed findings are substantially supported by the record. App.Br. 1-3; CP 95-101. Sometime around 5:25 AM on January 30, 2015, Officers responded to a Fife apartment to investigate a reported robbery. CP 96; RP 9-10. They spoke with victim Timothy Anderson, who described being robbed by the male associate of a prostitute he arranged to meet earlier that morning. CP 96; RP 9-10, 12. When she initially failed to appear, Anderson called a second prostitute. CP 96; RP 10. The first prostitute (Vasser-Learn) arrived as he was escorting the second prostitute from the premises. CP 96; RP 13. Vasser-Learn called her associates from the apartment's bathroom. *Id.* A man barged into the apartment with a woman identified as Patricia Grigsby shortly thereafter. CP 96; RP 14.

Anderson and his roommate described him as a 5'10", medium-thin African American with cornrow-styled hair, tattoos on his hands and one on his neck, which appeared to include the word "bitch." CP 97; RP 16. The man implied he was armed by the way he maintained a hand in his pocket throughout their contact. CP 96-97; RP 14-15, 27. While doing so, he demanded Anderson pay Vasser-Learn for responding to his call. CP 97; RP 14. Anderson complied; after which, the male threatened him then fled with Vasser-Learn and Grigsby in what appeared to be a black or dark colored, 2012 or newer Dodge Charger. CP 97; RP 15-16.

Detectives set up a "sting" operation around 1:00 PM that day. CP 97; RP 17-18. Posing as customers, they arranged to meet Vasser-Learn at a local hotel. *Id.* Officers patrolling the area were looking for her male robbery accomplice, described as a 5'9" to 5'10" African American with a tattoo on his neck potentially depicting the word "bitch" who had cornrow-styled hair, a red beanie and suggested the presence of a gun in his pocket during the robbery. CP 97; RP 18, 36-37, 70. Officers were advised of Vasser-Learn's arrival at 3:00 PM. CP 98; RP 72. Around that time, Officer Micenko saw defendant walk through the hotel parking lot, consistent with having been dropped off with Vasser-Learn. CP 98; RP 72-73.

Micenko contacted defendant in the lot. CP 97-98; RP 69, 78. Micenko observed he had tattooed writing on his neck but could not see what it said due to the distance between them and defendant's clothing. CP 98; RP 80, 90. Micenko also noticed defendant's bulky clothing appeared

weighed down by something in the pockets. CP 99; RP 81. Sgt. Farris arrived to assist. CP 97, 99; RP 43, 83. Micenko detained defendant in handcuffs and frisked his outer clothing. CP 99; RP 86. Both officers perceived defendant manifest furtive behavior; there was no "break in action" between this perceived threat and the frisk. CP 100; RP 83. Micenko felt a small handgun in defendant's coat pocket, which proved to be a loaded Beretta. CP 99; RP 24, 50, 88. He also discovered a "stun gun" in defendant's coat and a folding knife in his pants. CP 99; RP 89. Other officers observed a black, 2007 Dodge Charger parked at a nearby motel. CP 100; RP 56. It proved to be the car used in the robbery and it was occupied by accomplice Grisby. *Id.*

C. ARGUMENT.

1. THE COURT PROPERLY DENIED THE MOTION TO SUPPRESS DEFENDANT'S ILLEGALLY POSSESSED FIREARM BECAUSE IT WAS FOUND DURING A LAWFUL DETENTION INITIATED BECAUSE OF HIS SIMILARITY TO AN ARMED-ROBBERY SUSPECT AND SUSPICIOUS PRESENCE AT THE HOTEL WHERE POLICE COVERTLY ARRANGED TO MEET THE SUSPECT'S ACCOMPLICE.

The community expects police to be "more than mere spectators." ***State v. Young***, 135 Wn.2d 498, 511-12, 957 P.2d 681 (1998). "[I]t is well established ... [e]ffective law enforcement techniques ... necessitate ... interaction with citizens on the streets." *Id.* It is in those necessary interactions officers expose themselves to the greatest risk for the common

good. "[I]n the last decade, more than half a million police were assaulted in the line of duty. More than 160,000 were injured, and 536 were killed—the vast majority while performing routine law enforcement tasks like conducting traffic stops ...." ***Gonzales v. City of Anaheim***, 747 F.3d 789, 803-03 (9th Cir. 2014) (citing ***Mattos v. Agarano***, 661 F.3d 433, 453 (9th Cir. 2011) (Kozinski, concurring and dissenting in part)).

Investigative stops are a recognized exception to the warrant requirement. *See*, ***Terry v. Ohio***, 392 U.S. 1, 88 S. Ct. 1868 (1968); ***State v. Fuentes***, 183 Wn.2d 149, 158, 352 P.3d 152 (2015). They are permissible when there are specific-articulable facts which, taken together with rational inferences, warrant the intrusion. ***Terry***, 392 U.S. at 21. Only a founded suspicion that is not arbitrary or harassing is necessary. ***State v. Belieu***, 112 Wn.2d 587, 601-02, 773 P.2d 46 (1989); ***State v. McKinnon***, 88 Wn.2d 75, 91 n.2, 558 P.2d 781 (1977). Officers may typically search for and temporarily secure firearms when there is reason to suspect a detainee is armed and dangerous. ***State v. Perez***, 41 Wn. App. 481, 485, 704 P.2d 625 (1985); ***State v. Acrey***, 148 Wn.2d 738, 747, 63 P.3d 594 (2003). It is unreasonable to deny officers the power to take these necessary measures to neutralize a threat. ***State v. Rodriguez-Torres***, 77 Wn. App. 687, 691, 893 P.2d 650 (1995). Firearms may also be seized incident to arrest. ***State v. Byrd***, 178 Wn.2d 611, 618, 310 P.3d 793 (2013); ***State v. Smith***, 102 Wn.2d 449, 453, 688, P.2d 146 (1984).

Reviewing courts are reluctant to substitute their judgment for officers in the field. ***State v. Seagull***, 95 Wn.2d 898, 908, 632 P.2d 44 (1981). For this reason they consider the detaining officer's training and experience when evaluating a stop's reasonableness. ***State v. Glover***, 116 Wn.2d 509, 514, 806 P.2d 760 (1991). An officer's decisions are given greater deference when the conduct under investigation endangered life or safety. ***State v. Thierry***, 60 Wn. App. 445, 448, 803 P.2d 844 (1991). Subsequent evidence an officer acted on erroneous information will not render a stop unreasonable. ***State v. Seagull***, 95 Wn.2d 898, 908, 632 P.2d 44 (1981). Findings of fact underlying a court's denial of a motion to suppress will be upheld if supported by substantial evidence. ***State v. Bliss***, 153 Wn. App. 197, 203, 222 P.3d 107 (2009). Unchallenged findings are verities on appeal. ***State v. Hoang***, 101 Wn. App. 732, 738, 6 P.3d 602 (2000) (citing ***State v. Hill***, 123 Wn.2d 641, 644-47, 870 P.2d 313 (1994)). Conclusions of law are reviewed *de novo*. *Id.*

Undisputed findings of fact prove defendant was lawfully detained based on his articulable similarity to the armed-robbery suspect. The court rightly found Micenko to be an expert in detecting signs and behavioral cues common to dangerous contacts. CP 96. Micenko observed defendant in the parking lot of the precise hotel where a "sting" operation was underway to apprehend the armed-robbery suspect's accomplice, Vasser-Learn. The timing of defendant's presence was consistent with him being dropped off with her. CP 98; RP 73. Micenko perceived illegible-tattooed writing on his

neck. CP 98; RP 80, 90. Such a tattoo is somewhat unusual, especially on a person present at the appointed time and place of a covert operation to apprehend a similarly tattooed suspect's known accomplice. At the same time, defendant was wearing weighed-down clothing consistent with concealing a weapon similar to the one the robbery suspect implied was concealed in his pocket. CP 97, 99; RP 15, 27, 81. These articulable circumstances gave Micenko good reason to believe defendant was the suspect and posed a grave threat to him, his fellow officers and the public. This conclusion is further supported by the substantial evidence supporting the challenged findings of defendant's physical similarity to the robbery suspect, the nervous fight-or-flight behavior defendant manifested upon contact, and his admission to being dropped off by a dark colored Charger, which matched a description of the robbers' getaway car. CP 98-99; RP 79, 82; Ex. 4 at 0:36.

Defendant endeavors to impeach the significant similarities between him and the robber by pointing to the three inch difference between his *measured* height and robber's *estimated* height. But the difference is negligible, especially when the stressful circumstances attending the estimate are considered. Perceptions of height further vary according to factors like footwear and floor surfaces. Defendant likewise relies on another alterable difference between the robber's hair and his shaved head. But this presupposes the robber would not have wisely shaved the cornrows from his head before resuming his work as Vasser-Learn's pimp or

protector. Another solution would be to send her to the next job with another escort, which perhaps accounts for why defendant arrived with her carrying a loaded firearm, stun gun and knife. Unfortunately for him, he too closely resembled her robbery accomplice, due in part to the decision of both men to display their conspicuous neck tattoos while engaged in illicit activities.

Defendant mistakenly maintains the detention was more intrusive than necessary, claiming officers could have ruled him out as the suspect by asking him to remove his hat or lower his collar. But this argument improperly invites the Court to second guess the officer's reasonable-safety decision to maintain control of an armed-robbery suspect's hands. ***U.S. v. Sharpe***, 470 U.S. 675, 686, 105 S. Ct. 1568 (1985). The officers employed to protect us are not compelled to wager their lives in such circumstances to spare detainees like defendant the *de minimis* intrusion of a weapon's frisk. Nor are they required to respond to dynamic threats by identifying the least restrictive means of ensuring everyone's safety. They are only required to act reasonably. *Id.* at 686-87. An officer confronted with an apparently armed robbery suspect could reasonably perceive it unwise to permit freedom of movement that would enable him to secure a weapon from his hat or the clothing attached to that collar. Defendant's claim the initial detention and frisk were inadequately based on nothing more than race and location does not stand up to scrutiny, so his conviction should be affirmed.

2. THIS COURT SHOULD WITHHOLD REVIEW OF DEFENDANT'S UNPRESERVED CHALLENGE TO THE DETENTION'S SCOPE OR OTHERWISE AFFIRM HIS CONVICTION BECAUSE THE DISCOVERY OF HIS ILLEGALLY CONCEALED FIREARM AFTER HE LIED ABOUT BEING UNARMED GAVE POLICE REASON TO EXPAND THE INVESTIGATION AND PROBABLE CAUSE FOR HIS ARREST.

a. Defendant waived this claim of error by failing to raise it below.

Defendants typically cannot switch theories for the suppression of evidence on appeal. ***State v. Mak***, 105 Wn.2d 692, 718-719, 718 P.2d 407 (1986), *overruled on other grounds* ***State v. Hill***, 123 Wn.2d 641, 870 P.2d 313 (1994). An appeal's scope should be limited by the objections made at trial. ER 103(a)(1); ***State v. Harris***, 154 Wn. App. 87, 94, 224 P.3d 830 (2010); ***DeHaven v. Gant***, 42 Wn. App. 666, 669, 713 P.2d 129 (1986); ***State v. Boast***, 87 Wn.2d 447, 451, 533 P.2d 1322 (1976). Appellate courts will not generalize specific objections to enable review of new theories. ***DeHaven***, 42 Wn. App. at 670. For where a trial court is not asked to rule and did not rule, there can be no associated constitutional error manifest in the record as there must be for unpreserved claims of wrongly admitted evidence to win review. RAP 2.5(a)(3); ***State v. Roberts***, 158 Wn. App. 174, 181-82, 240 P.3d 1198 (2010), *rev. granted*, 172 Wn.2d 1017, 262 P.3d 64

(2011); ***State v. O'Hara***, 167 Wn.2d 91, 98, 217 P.3d 756 (2010); ***State v. McFarland***, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995).

Defendant's motion to suppress was limited to challenging the initial detention and frisk. CP 3-8; RP 107-08. He failed to raise the meritless claim police could not expand the detention long enough to run the records check that revealed the predicate felony underlying his UPOF charges after the frisk revealed an illegally concealed firearm, which proved he committed the crime of false statement when he lied about being unarmed. RP 48. He only referenced the expanded detention in cross-examination to isolate the moment when Micenko noticed several facts that gave him reason to suspect defendant of being the robbery suspect. CP 3-8; RP 59, 61, 97, 107-08. Defendant's failure to establish a manifest error attending the expanded detention makes it unreviewable. RAP 2.5(a)(3).

b. It was lawful to detain defendant long enough to find the felony underlying his UPOF charge during a records check as the discovered handgun gave police more reason to investigate the robbery and cause to arrest him for two misdemeanors.

An investigative detention is limited by its purpose. Its scope may be extended and duration prolonged if suspicions are confirmed or aroused. No time limit applies. ***Sharpe***, 470 U.S. at 685; ***Adams v. Williams***, 407 U.S. 143, 92 S. Ct. 1921 (1972). ***Michigan v. Summers***, 452 U.S.692, 700 n.12, 101 S. Ct. 2587 (1981); ***Sharpe***, 470 U.S. at 686 . "Such a limit would undermine the ... need to allow authorities to graduate their responses to

the demands of any particular situation." ***United States v. Place***, 462 U.S. 696, 709, n.10, 103 S. Ct. 2637 (1983).

A detention's duration is lawful if pursued by means likely to quickly confirm or dispel suspicion. ***Sharpe***, 470 U.S. at 686. Courts take care "[n]ot [to] indulge in unrealistic second-guessing." *Id.* Establishing "[p]rotection of the public might ... have been accomplished by less intrusive means does not ... render [a detention] unreasonable." *See Id.* at 686-87 (citing ***Cady v. Dombrowski***, 413 U.S. 433, 447, 93, S. Ct. 2523 (1973); *see also* ***United States v. Martinez-Fuerte***, 428 U.S. 543, 557, n.12, 96 S. Ct. 3074 (1976)). "The question is not ... whether some ... alternative was available, but whether ... police acted unreasonably in failing to ... pursue it." *Id.*

There was nothing unconstitutional about the duration and intrusiveness of defendant's detention. *E.g.* ***Belieu***, 112 Wn.2d at 596 (burglary investigation justified ten minute stop with suspects frisked, handcuffed, and separated); ***State v. Cunningham***, 116 Wn. App. 219, 228-29, 65 P.3d 219 (2003) (forty five minute handcuffed detention permissible to verify identity). The purpose of the stop was to investigate an armed-robbery. The violent nature of the crime justified detaining defendant long enough to check his record and verify his statements. ***State v. Sinclair***, 11 Wn. App. 523, 529, 523 P.2d 1209 (1974).

Defendant incorrectly contends police were powerless to do anything more than immediately release him with a civil infraction for the

concealed handgun. This argument is fatally flawed in three ways. Discovery of a concealed handgun in defendant's coat was one more fact linking him to the robbery suspect under investigation, which by itself justified expanding the detention to include a records check. It also proved he committed the crime of false statement when he previously lied about being unarmed. RCW 9A.76.175; RP 48. Finally, defendant's claim the firearm's concealment only gave police authority to immediately cite and release is based on a misunderstanding of the applicable law. An officer can run a records check while issuing a citation. *See* ***State v. McKinney***, 148 Wn.2d 20, 32, 60 P.3d 46 (2002); *see also* ***State v. Chenoweth***, 160 Wn.2d 454, 480, 158 P.3d 595 (2007). And carrying a concealed firearm is a misdemeanor *unless* one simply forgot to simultaneously carry his or her concealed-firearm permit. RCW 9.41.050(1)(a)-(2)(b). Defendant admitted such a permit had never been issued to him. Ex. 4 at 3:47. So his factually unsupported and legally inaccurate challenge to the records check that revealed the felonious quality of his handgun possession should be rejected.

3. DEFENDANT FAILED TO PROVE COUNSEL WAS INEFFECTIVE FOR REASONABLY DECLINING TO ARGUE FOR SUPPRESSION BASED ON HIS ABSURD THEORY POLICE CANNOT DETAIN AN ARMED-ROBBERY SUSPECT LONG ENOUGH TO CONDUCT A RECORD CHECK AFTER FINDING AN ILLEGALLY CONCEALED HANDGUN ON HIS PERSON THAT PROVED HE LIED ABOUT BEING UNARMED.

To prevail on an ineffective assistance claim a defendant must prove counsel's performance was deficient and the deficiency prejudiced the

defense. ***State v. Garret***, 124 Wn.2d 504, 518, 881 P.2d 185 (1994); ***Strickland v. Washington***, 466 U.S. 668, 688, 104 S. Ct. 2052 (1984).

a. Defendant failed to prove counsel's reasonable motion strategy was deficient.

Counsel's presumptively proficient performance will only be found deficient when a defendant proves it fell below an objective standard of reasonableness. ***McFarland***, 127 Wn.2d at 334-35. This requires a defendant to prove the absence of any legitimate strategic or tactical reason for counsel's conduct. ***In re Pers. Restraint of Elmore***, 162 Wn.2d 236, 252-53, 172 P.3d 335 (2007). It is reasonable strategy for counsel to advance the most persuasive theory for suppression of incriminating evidence available to a defendant instead of detracting from it through the addition of weaker claims perceived likely to fail. *See* ***In re Pers. Restraint of Davis***, 152 Wn.2d 647, 721-22, 101 P.3d 1 (2004)). "Counsel is not, at the risk of being charged with incompetence, obliged to raise every conceivable point ... which in retrospect may seem important to the defendant." ***State v. Piche***, 71 Wn.2d 583, 590, 430 P.2d 522 (1967).

Defendant's counsel performed reasonably by limiting the motion for suppression to an issue that could be argued in good faith. One could reasonably contend he was fulfilling his obligation to refrain from making frivolous claims when he refrained from asserting police could not detain defendant long enough to check his record after finding him in possession

of an illegally concealed handgun during an armed-robbery investigation where he previously lied about being unarmed.

b. Defendant failed to prove he was prejudiced by the omission of his frivolous claim.

When a claim of prejudice is predicated on the omission of a motion to suppress, a defendant must prove there is a reasonable probability it would have been granted and changed the outcome of the case. *See* ***McFarland***, 127 Wn.2d at 335; ***State v. Contreras***, 92 Wn. App. 307, 319, 966 P.2d 915 (1998). "There is no basis ... to find ineffective assistance for ... counsel's failure to move to suppress evidence in anticipation of a change in the law." ***State v. Pearsall***, 156 Wn. App. 357, 362, 231 P.3d 849 (2010), *rev. granted, remanded on other grounds*, 172 Wn.2d 1003, 257 P.3d 1113 (2011). Even proof of demonstrable tactical errors will not support reversal so long as the adversarial testing envisioned by the Sixth Amendment occurred. ***United States v. Cronic***, 466 U.S. 648, 656, 104 S. Ct. 2045 (1984).

Defendant cannot prove he was prejudiced by counsel's failure to challenge the duration of the detention after defendant's illegally concealed handgun was discovered. The claim could only have succeeded if the court erroneously adopted defendant's misunderstanding of the law. Even assuming the law left more room for defendant's claim and the relevant officer's conduct was less obviously reasonable, a finding of prejudice

would not easily flow from the claim's omission due to the uncertainty of success. Reasonable minds often differ on how best to resolve a given set of facts under the ***Terry*** line of cases as they call upon practitioners to weigh abstract probabilities under the amorphous reasonable suspicion standard. Outcomes often turn on a trial court's sometimes impossible to predict impressions of witness credibility and the like. So short of a binding case directly addressing the precise circumstances before a court, one would generally be hard pressed to prove a trial court would have granted a ***Terry*** claim if raised. Courts have regularly found no actual prejudice based on failure to urge suppression under similar circumstances, even when it can be said "the motion likely would have been granted." ***Contreras***, 92 Wn. App. at 319; ***State v. Pearsall***, 156 Wn. App. 357, 362, 231 P.3d 849 (2010); ***State v. Bonds***, 174 Wn. App. 553, 571, 299 P.3d 663 (2013); ***State v. Kirwin***, 137 Wn. App. 387, 394, 153 P.3d 883 (2007).

Decisions in this area of the law are consequently distinguishable from those dealing with bright-line rules, like ***State v. Hamilton***, 179 Wn. App. 870, 879-81, 320 P.3d 142 (2014), which defendant misapplies to this case. The attorney in ***Hamilton*** missed guaranteed suppression by neglecting to challenge a warrantless search where a warrant was required. But no similar certainty of success adheres to even the most generous interpretation of the issue defendant claims his counsel ineffectively failed to raise. Defendant's inability to prove prejudice provides another reason to affirm his conviction.

D. CONCLUSION.

The denial of defendant's motion to suppress should be affirmed because the initial detention and frisk were reasonable. Defendant failed to preserve his challenge to the detention that followed the discovery of his illegally possessed firearm and failed to prove trial counsel was ineffective for neglecting to advance that frivolous challenge for him below.

RESPECTFULLY SUBMITTED: February 16, 2016.

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Certificate of Service:
The undersigned certifies that on this day she delivered by e-mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

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